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JOSEPH PAULUS LANTIP v. TNIO CHEE CHANG & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
MARY LIM JCA
B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEALS NO: S-02(NCVC)(W)-71-01-2018
& S-02(NCVC)(W)-79-01-2018]
3 JANUARY 2020

C ***CIVIL PROCEDURE:*** *Statement of claim – Pleadings – Parties entered into timber agreement – Claim for specific performance, damages and loss of profits in lieu or in addition to order of specific performance – Whether complaint based on tort of conversion – Whether there was cause of action in tort of conversion – Whether tort of conversion pleaded sufficiently – Principles of pleadings – Whether complied with*

D ***TORT:*** *Conversion – Damages – Parties entered into timber agreement – Claim for specific performance, damages and loss of profits in lieu or in addition to order of specific performance – Whether complaint based on tort of conversion – Whether there was cause of action in tort of conversion – Whether tort of conversion pleaded sufficiently and made out – Whether elements of conversion proven – Whether claim*
E *based on breach of contract or conversion*

The appellant ('the first defendant') was the owner of 467 parcels of native titles land on which timber could be found. On 22 March 2011, the respondent ('plaintiff') and the first defendant entered into an agreement,
F where the latter agreed to sell to the former all the commercial timber extracted from the land ('agreement'). Pursuant to the agreement, the timber may only be extracted within one month from the approval date of the timber extraction licence from the Forestry Department and the extraction shall be completed within 24 months from the date of the agreement. On the same date, the first defendant granted the plaintiff a power of attorney ('POA') for
G the duration of 24 months, from 22 March 2011 until 21 February 2013. However, the plaintiff did not extract the timber within the 24-month period as, according to him, (i) he did not have the requisite licence from the Forestry Department to do so; (ii) the first defendant misrepresented himself as the registered owner of the 467 lands when he owned only 120 lands and,
H even then, only 18 titles constituted 'block of parcels'; (iii) the Forestry Department was only willing to issue licence for parcels constituting a block and not for scattered or separated parcels of land, as was supposed the state of the first defendant's lands. This meant the plaintiff was only able to extract timber from around 18 titles constituting a block of parcels. Following the
I matters raised, the first defendant executed a second POA in favour of the plaintiff and further assured the plaintiff that he would do the necessary to have all 467 titles registered in his name. Despite his assurance, the first defendant failed to have the titles registered in his name, as a result of which

he could not proceed with the timber extraction. The plaintiff later discovered (i) that Banjaran Astaka Sdn Bhd ('second defendant') had entered into and extracted timber from part of the lands which the first defendant had already sold to him; (ii) the second defendant had done so under the POA granted to him by the first defendant; (iii) despite informing the second defendant that he had a prior POA over the lands and despite having agreed to stop all timber extraction works, the second defendant continued to extract timber from the lands.

This prompted the plaintiff to commence an action at the High Court against (i) the first defendant for misrepresentation and for the failure to have the 467 titles registered in his name, seeking specific performance, damages in addition to or *in lieu* thereof, and an order of injunction restraining the first defendant from any dealings in respect of the lands; and (ii) the second defendant, seeking an order that the second defendant account to the plaintiff for all timber extracted, damages including loss of profits and injunction in like terms as those sought against the first defendant. The first defendant counterclaimed for (i) the sum of RM150,000, being the balance due as consideration for the second POA; (ii) several declaratory orders including a declaration that the second POA was made in March 2013 and not on 31 December 2013; (iii) a declaration that the second POA had lapsed; (iv) a declaration that the plaintiff would have been able to obtain the licence from the Forestry Department to remove the extracted timber notwithstanding that the first defendant was not the registered owner of the lands. The second defendant too counterclaimed for operational costs incurred due to the plaintiff's unlawful stoppage of his work and other related losses and damages. At the conclusion of the trial, the Judicial Commissioner ('JC') held that (i) the effective period of the second POA was December 2013 to December 2015; (ii) there was conversion and it was not necessary to specifically plead 'conversion' in the statement of claim; (iii) the defendants were ordered to jointly and severally pay the plaintiff damages in the sum of RM2,680,511.68 together with interests and costs; (iv) the first defendant's version on the validity period of the second POA was unconvincing and it was inconceivable for the first defendant not to say anything to the Forestry Department notice about the plaintiff's reliance on his copy of the second POA or show to the Forestry Department his own copy of the second POA regardless the lack of registration; (v) it was implausible for the first defendant, a businessman of 34 years to have given the plaintiff a partially dated second POA when there was still RM150,000 to be paid simply to allow the plaintiff to show the second POA to his financiers; and (vi) the plaintiff had paid the first defendant the balance sum of RM150,000 in October 2013 and it was upon this payment that the first defendant gave the plaintiff the second POA. The JC rejected the plaintiff's claim of loss of profits as this was only an estimation by the witness called by the second defendant and further rejected the counterclaims by the defendants. Hence, the respective appeals by the defendants.

Held (allowing appeals; setting aside decision of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) The decision reached by the JC was one which 'could not reasonably be explained or justified and was one which no reasonable judge could have reached' and had to be set aside. There was a misapprehension of the plaintiff's case and the nature of the underlying dispute between the parties. According to the pleaded claim, the plaintiff sought specific performance and damages, including loss of profits *in lieu* thereof or in addition to the order of specific performance. The pleaded claim was allowed and damages of the sum was granted. Those damages were, however, allowed not for breach of contract, whether of the agreement or even the POAs, but for the tort of conversion which the JC found had been established as the plaintiff 'had pleaded sufficient facts related to conversion …'. This was erroneous. The pleaded case of the respective parties did not reveal a complaint based on conversion. The role played by pleadings could not be overstated. All parties are bound by their pleadings. It would be most damaging to the Malaysian administration and system of justice if parties were allowed to plead a certain complaint, lead evidence on another and the court, decide on something entirely different. (paras 25-29)

(2) Although only material facts need to be pleaded upon which parties may then submit and claim the legal consequences of those pleaded material facts; that is still a long way off from concluding that a party may claim any legal consequence, especially one which the pleaded material facts are not capable of yielding or where a particular cause of action has already been charted. It is incumbent on a trial judge to examine all pleaded facts set against the whole pleaded claim. A trial judge should refrain from picking up only certain pleas and then, string them to a case different from that which is patently on the face of the pleas and to which the defendants, in this case, have responded through the defences filed, the trial that they prepared for and conducted, and the submissions that they respectively made at the close of evidence. (para 35)

(3) It is not open to the court to fashion a cause of action or even defence for any of the parties. The plaintiff had pleaded material facts in his amended statement of claim for his particular choice of cause of action and reliefs (specific performance, injunction and damages). The remedy of specific performance was, in fact, indicative of what exactly was the plaintiff's cause of action and it clearly was associated with a claim for a breach of contract as contained in the agreement and the POAs, all by reason of misrepresentation. The plaintiff was seeking specific performance of the agreement and the second POA. In any event, the claim for conversion was not made out. (paras 37 & 41)

(4) Of the two documents, the agreement was more critical than the POA as it conferred rights or obligations on the parties. *Sans* the agreement, the POA was not of much utility. The plaintiff had not alleged that the agreement was renewed or extended at the same date as the second POA, whether expressly or by inference. The defence did not make such plea either, as by the trial, this was a material issue and it was an issue which the first defendant was entitled to raise. If the agreement was not renewed, then whatever that has been authorised under the POA, whether the first or the second POA, remained very much matters done on behalf of the first defendant. This material and relevant issue was not at all considered by the JC. (paras 53 & 54)

(5) The terms of the timber sale agreement brought to bear that all the plaintiff had bought from the first defendant was a licence or a contractual right to extract commercial timber from the lands. The agreement was never about the sale of the lands and this distinction was valid and relevant to the cause of action. Such contractual right, an actionable claim is not capable of being converted in law. The plaintiff's remedy, if at all there was a breach, laid in contract but not in the law of tort. The plaintiff may only sue for breach of contract but he could not by virtue of the agreement or even the POAs, assert rights or ownership over the lands or even the trees or timber on such lands. (para 55)

(6) A claim in contract could not be considered for the simple reason that the plaintiff elected to pursue a claim in the tort of conversion. It was too late for the plaintiff to reverse and rely on a contractual claim. In any case, such a claim was not made out by the plaintiff. (paras 58 & 59)

(7) Since the second POA was to extend the period of extraction of timber, the defendants' version was inherently more probable – that the second POA would run from the expiry of the first POA instead of this substantial lapse of almost nine months in the case of the second POA relied on by the plaintiff, more so when it was appreciated that the POA was always to facilitate the agreement. The plaintiff offered no explanation on this. Instead, the existence of the three sets of the second POA was consistent with the first defendant's version on the second POA that initially he was only prepared to give the plaintiff a POA for 12 months but, after negotiations, he was agreeable to a 24-month period from the expiry of the first POA. Further, the plaintiff never denied that it was he who dated the second POA, though signed by the first defendant, this lending credence to the first defendant's version on the second POA which ought to have been picked up by the JC. In any case, the second POA did not give exclusive authorisation to the plaintiff; it was open to the first defendant to give the second defendant a POA. (paras 61 & 62)

(8) It was not open to the JC to find the two defendants jointly and severally liable. There was no plea to that effect and the rules on the pleadings applied with equal force to this ground of appeal relied on by the defendants. The finding of liability against the defendants was therefore erroneous and liable to be set aside. (para 63)

(9) The defendants were not pursuing the appeal against their counterclaim. However, there was an error in the principle of the award and its quantification. The first defendant's pleaded counterclaim was for the payment of the balance sum of RM150,000 declaratory orders and all consequential losses and damages due to the plaintiff's interference in the second defendant's extraction of timber. The second defendant's counterclaim was for operational costs and loss of sale of extracted logs totaling to RM2,015,264. Since the JC rejected the estimates relied on by the plaintiff, and given that there were no pleas by the second defendant for loss of profits, there was really, at the end of the day, no evidence before the High Court to make the award that it did. The plaintiff had failed to prove his claim and his losses. (paras 64, 66 & 67)

Case(s) referred to:

Abington v. Lipscombe (1841) 1 QB 766 ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***
Kemajuan Kuari (M) Sdn Bhd v. PTB Suramix Sdn Bhd & Ors [2016] 4 CLJ 200 CA ***(refd)***
Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd [2017] 5 CLJ 150 CA ***(refd)***
Morgan v. Russell & Sons [1909] 1 KB 357 ***(refd)***
OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd [2019] 10 CLJ 1 CA ***(refd)***
Rimba Muda Timber Trading v. Lim Kuoh Wee [2006] 3 CLJ 93 FC ***(refd)***
See Leong Chye & Anor v. United Overseas Bank Bhd & Another Appeal [2018] 10 CLJ 1 FC ***(refd)***
Tat Seng Machine Movers Pte Ltd v. Orix Leasing Singapore Ltd [2009] SGCA 42 ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:

Forest Enactment 1968 (Sabah), s. 23
Rules of Court 2012, O. 18 r. 8
Specific Relief Act 1950, s. 11

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[Editor's note: Appeal from High Court, Kota Kinabalu; Civil Suit No: BKI-22NCVC-49-5-2015 (HC1) (overruled).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

[1] These two related appeals were respectively filed by the first and second defendants. The High Court had allowed the respondent's claim for specific performance of an agreement to extract timber and had further ordered the appellants to pay damages in the sum of RM2,680,511.68 for the timber extracted. Upon full consideration of the submissions, the records of appeal and the grounds of judgment, both appeals were unanimously allowed.

[2] For ease of reference, the parties will be referred to as they were at the High Court.

Material Background

[3] The first defendant is the registered and beneficial owner of a total of 467 parcels of native titles land located in Kampung Kieyap, Ranau and measuring an area of over 5,000 acres (the said lands). Timber could be found on the said lands.

[4] On 22 March 2011, the plaintiff and the first defendant entered into an agreement wherein the first defendant agreed to sell to the plaintiff "all the commercial timber extracted from the said land" irrespective of timber species at the rate of RM700,000 in which "20% shall be paid upon signing of this agreement, putting on tractor on site 20%, issuance of Form I or Form II B timber licence 20% on and on first loading of timber 40%" (timber sale agreement). We pause here to note that although the term "agreement" is mentioned in the amended statement of claim, we understand that it must necessarily refer to the timber sale agreement.

[5] Pursuant to cl. 4 of the timber sale agreement, the timber may only be extracted within a specified "time window"; that is, the plaintiff "shall commence extractions of all merchantable timber from the said land within one month from the approval date of timber extraction licence from the Forestry Department"; and "shall complete the timber extraction within 24 months from the day of this agreement."

[6] On that same date, the first defendant granted the plaintiff a power of attorney, appointing the plaintiff "to be my true and lawful attorney for me and in my name or in its name and on my behalf to do all or any of the following acts matters and things in connection with and in relation to the said land" (first PA). Although the first PA is stated as "shall deem terminated and with no legal effect within 24 months from the date hereof", it is not in dispute that the first PA was for the duration of 24 months from 22 March 2011, automatically expiring on 21 February 2013. What is in dispute is the matter of a second PA.

[7] Apparently, the plaintiff did not extract timber from all of the said lands within the 24-month period. He claimed that he "could not proceed with the timber extraction" because he did not have the requisite licence from the Forestry Department to do so. He blamed this on the first defendant, claiming that the first defendant had misrepresented himself as the registered owner of all 467 native titles when he was registered owner to only 120 native titles and even then, only 18 titles constituted "block of parcels". The plaintiff also claimed that the Forestry Department was only willing to issue licence for parcels constituting a block and not for scattered or separated parcels of land, as was supposedly the state of the first defendant's lands. According to the plaintiff, this meant he was only able to extract timber from "around 18 titles constituting a block of parcels".

[8] After raising these matters with the first defendant, the first defendant executed a second PA in favour of the plaintiff and further assured the first defendant that he will "do what was necessary to have all the 467 native titles registered in his name". The plaintiff claimed that despite his assurances, the first defendant failed to have the titles registered in his name, as a result of which he could not proceed with the timber extraction.

[9] The plaintiff then discovered that the second defendant had entered into and extracted timber from part of the said lands which the first defendant had already sold to him. Apparently, the second defendant had done so under a power of attorney dated 29 August 2014 granted to him by the first defendant. The plaintiff alleged that despite informing the second defendant that he had a prior PA over the said lands which was effective for 24 months from 31 December 2013, and despite having agreed to stop all timber extraction works, the second defendant continued to extract timber from the said lands.

[10] The plaintiff sued the first defendant for misrepresentation and for failure to have the 467 titles registered in his name, seeking specific performance, damages in addition to or *in lieu* thereof, and an order of injunction restraining the first defendant from any dealings in respect of the said lands inconsistent with the plaintiff's rights to the timber on the said lands, from extracting timber and from interfering in his timber extraction. As against the second defendant, the plaintiff sought an order that the second defendant account to him for all timber extracted, damages including loss of profits, and an injunction in like terms as those sought against the first defendant.

[11] The first defendant counterclaimed for the sum of RM150,000 being the balance due as consideration for the second PA; and several declaratory orders including a declaration that the second PA was made in March 2013 and not on 31 December 2013; and a declaration that the second PA had lapsed; a declaration that the plaintiff would have been able to obtain the licence from the Forestry Department to remove the extracted timber

notwithstanding that the first defendant was not the registered owner of the said lands. The second defendant too counterclaimed for operational costs incurred due to the plaintiff's unlawful stoppage of his work and other related loss and damage.

[12] The learned Judicial Commissioner (JC) identified two issues for determination:

(i) what was the effective period of the second PA, was it from March 2013 to March 2015 as contended by the defendants or from December 2013 to December 2015, as contended by the plaintiff; and

(ii) if the second PA is valid from December 2013, what is the quantum of compensation.

[13] After a full trial, the learned JC answered the first issue in the plaintiff's favour and then proceeded to order the defendants to jointly and severally pay the plaintiff damages in the sum of RM2,680,511.68 together with interest and costs.

[14] The learned JC found the first defendant's version on the validity period of the second PA "to be unconvincing"; finding it "inconceivable" for the first defendant to "not say anything" to the Forestry Department's notice dated 7 April 2015 about the plaintiff's reliance on his copy of the second PA dated 31 December 2013, or show to the Forestry Department his own copy of the second PA dated 22 March 2013, regardless the lack of registration.

[15] The first defendant had explained that in early 2013, the plaintiff had approached him with the intention of extending both the timber sale agreement and the first PA for another two years. The first defendant was however, only agreeable to a 12-month extension. After negotiations, the first defendant agreed to a 24-month extension upon terms *inter alia* that the plaintiff was to pay the first defendant a further sum of RM200,000, and that the 24-month period commenced from the expiry of the first PA.

[16] According to the first defendant, the plaintiff only paid him RM50,000 in cash with the balance sum paid by way of a cheque. The first defendant had prepared three sets of PA, one dated 22 March 2013 for 12 months and, two for 24 months. He had only dated one of the two sets of PAs for 24 months as effective 22 March 2013 and had, upon the plaintiff's request, given the plaintiff a partially dated copy to show to his financiers. It was described as "partially dated" in that only the year "2013" was inserted. He was also told by the plaintiff to not bank in the cheque for RM150,000 as the plaintiff did not have money in his bank account. The first defendant claimed that it was the plaintiff who unilaterally dated the second PA effective from 31 December 2013 when it should be dated 22 March 2013.

[17] Despite being given the second PA, the first defendant claimed that the plaintiff did not extract any timber; neither did he apply for any licence leading the first defendant to conclude that the plaintiff was no longer interested in extracting timber on the said lands. Therefore when the second defendant's manager approached him in the middle of 2014 expressing interest in extracting timber on the said lands, he informed the second defendant of the existence of the second PA and that any grant to the second defendant would only commence upon expiration of the second PA on 22 March 2015.

[18] Upon these terms, the defendants signed a timber sale agreement and a PA both dated 29 August 2014, allowing the second defendant 48 months to extract timber. The second defendant claimed that he only started extracting timber after the second PA expired on 22 March 2015. The first defendant claimed that the plaintiff only "came in again into the lands when he came to know that the second defendant had entered the lands."

[19] The learned JC agreed with the plaintiff that it was "implausible" for the first defendant, a businessman of 34 years to have given the plaintiff a partially dated second PA when there was still RM150,000 to be paid simply to allow the plaintiff to show the second PA to his financiers. Again, the learned JC described it as "inconceivable" for the first defendant to not be aware that the handing to the plaintiff a signed, attested and partially dated PA "is as good as handing to that person a signed, attested and fully dated power of attorney as there is nothing to stop that person from inserting onto the power of attorney any part of the date that was left unwritten"; and "odd" that the first defendant never made any request or demand for the payment of the balance sum.

[20] The learned JC was also satisfied that the plaintiff had paid the first defendant the balance sum of RM150,000 in October 2013 and that it was upon this payment that the first defendant then gave the plaintiff the second PA. This second PA commenced from 31 December 2013 and not from the expiry of the first PA. The learned JC opined that if the first defendant intended the second PA to run from the first PA, the first defendant ought to have dated the second PA accordingly; but since he did not, it then operated from the date as claimed by the plaintiff.

[21] Consequently, the High Court held that the first defendant was in breach of the agreement when he granted another power of attorney to the second defendant after having granted the second PA to the plaintiff. The learned JC found that the plaintiff "would have rights to the timber on the lands until 31 December 2015 and the first defendant would also be in guilty of conversion in purporting to re-sell to the [*sic*] first defendant (for an undisclosed sum) what the first defendant had already sold to and what already belonged to the plaintiff (the rights to the timber for the period until December 2015). As regards to the second defendant, the second defendant

would be guilty of conversion (and trespass to land) in extracting and selling the timber from the lands for the period until December 2015 when the rights to do so belonged to the plaintiff."

[22] Although the plaintiff's primary remedy was the order of specific performance, using the omnibus prayer of "further or other relief as this honourable court thinks fit" the learned JC proceeded to award damages; agreeing with the plaintiff that since he had multiple causes of action arising from the same set of facts, while the plaintiff cannot have double recovery, he was at liberty to elect. The court found that the plaintiff had a claim both in contract and in tort against the first defendant and in conversion and trespass as against the second defendant; that it was open to the plaintiff to elect between the two remedies; that in the tort of conversion, the measure of damages was the market value of the property converted at the time of conversion. The plaintiff then submitted a loss of profits of RM3,842,262.96 based on the profit margin of RM8 per cubic feet for 480,282.87 cubic feet of logs extracted by the second defendant as recorded with the Forestry Department.

[23] The learned JC rejected the plaintiff's claim of loss of profits as this was only an estimation by the witness [2DW3] called by the second defendant but nevertheless awarded RM2,680,511.68 "calculated based on the figures pleaded by the second defendant, hence indisputable, would be the proper quantum of damages".

[24] The counterclaim of both defendants was dismissed following the determination that "it is inherently much more probable that the first defendant handed over the second PA to the plaintiff only after full payment had been made".

Our Decision

[25] Upon careful consideration of the records of appeal, the reasoning of the learned JC and the submissions as well as further submissions of all parties, we were unanimous in our deliberations and conclusion that both appeals before us were of merit, amply satisfying the plainly wrong test as laid down by the apex court in a long line of consistent decisions. See for example: *See Leong Chye & Anor v. United Overseas Bank Bhd & Another Appeal* [2018] 10 CLJ 1, *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; *UEM Group Berhad v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1. We were convinced that the decision reached by the learned JC was one which "could not reasonably be explained or justified and was one which no reasonable judge could have reached" and which had to be set aside. These are our reasons for this conclusion.

[26] First is the misapprehension of the plaintiff's case and the nature of the underlying dispute between the parties. According to the pleaded claim, the plaintiff sought specific performance and damages including loss of profits *in lieu* thereof or in addition to the order of specific performance. The pleaded claim was allowed and damages of the sum earlier mentioned was granted. Those damages were however, allowed not for breach of contract, whether of the timber sale agreement or even the PAs, but for the tort of conversion which the learned JC found established as the plaintiff "has pleaded sufficient facts related to conversion in paras. 10, 12 and 13 of the statement of claim …"

[27] With respect to the learned JC, we find this erroneous.

[28] The role played by pleadings cannot be overstated. It is a fundamental principle of fair play which extends to the court, that all parties are bound by their pleadings. It would be most damaging to our administration and system of justice if parties are allowed to plead a certain complaint, lead evidence on another and the court, decides on something entirely different. The Federal Court recently reminded and expressed the following view on the importance of proper pleadings in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415:

> [29] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v. Public Bank Bhd* … In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: … In *The Chartered Bank v. Yong Chan* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 1 MLJ 157, the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case, the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

[29] Having examined the pleaded case of the respective parties, in particular that of the plaintiff's, we are unable to find a complaint based on conversion, whether in the paragraphs identified by the learned JC or in the entire amended statement of claim.

[30] The amended statement of claim alludes, quite clearly in our judgment, to the following matters:

(i) the making of an agreement "in or around March 2011" (paras. 1 - 3);

(ii) by this agreement, the first defendant "sold to the plaintiff all rights to the timber of the lands held under 467 native titles located at Kampung Kieyep, Ranau" (paras. 1 - 3);

(iii) by this agreement, the plaintiff had 24 months to complete the extraction of the timber from "the lands held under 467 native titles located at Kampung Kieyep, Ranau" (paras. 1 - 3);

(iv) further or pursuant to this "agreement", a timber sale agreement was entered and the first power of attorney was granted (paras. 1 - 3);

(v) that the first defendant knowingly represented himself as the registered owner of 467 native titles when he was registered owner for 120 titles (paras. 4 - 7);

(vi) that because the first defendant was not the registered owner of all 467 native titles, the plaintiff was not able to get the necessary licence from the Forestry Department in order to extract timber (para. 7);

(vii) that because the 120 titles were not in blocks, the Forestry Department was not willing to issue licence for scattered or separated parcels (para. 8);

(viii) that the plaintiff was only able to extract timber from 18 titles constituting block of parcels (para. 9);

(ix) that after raising the matter of the titles with the first defendant a second power of attorney was issued (para. 10);

(x) that despite the first defendant's assurances, the first defendant failed to have the titles which were not registered in his name, registered in his name;

(xi) that as a result of the first defendant's failure, the plaintiff could not proceed with the timber extractions (para. 11);

(xii) the discovery of the second defendant's entry and extraction of timber (para. 12);

(xiii) despite agreeing to stop, the second defendant continued to extract timber from the lands (para. 13).

[31] On the strength of the above complaints, the plaintiff sought reliefs of specific performance, damages and injunction.

[32] It was the learned JC's view that paras. 10, 12 and 13 were relevant to the claim for conversion:

> 10 ... the plaintiff and the first defendant then agreed that the 24 month period to extract the timber would be extended to December, 2015, further to which the first defendant granted the plaintiff a further Power of Attorney dated December 31, 2013 (the 'Second Power of Attorney) with a stated effective period of 24 months from the date thereof ...
>
> 12. Subsequently, the plaintiff discovered that the second defendant had entered into part of the Lands to extract timber from the Lands, purportedly upon powers of attorney granted by the first defendant dated August 29, 2014 for the same 467 native titles.

> 13. Despite having been informed by the plaintiff that the plaintiff has a prior power of attorney over the Lands and despite having agreed to stop all timber extraction works, the second defendant has continued to extract timber from the Lands.

[33] The learned JC had found conversion after finding that the second PA granted was for the period as claimed by the plaintiff, that is, until December 2015. According to the learned JC, the first defendant purported "to sell to the second defendant in August 2014 (for an undisclosed sum) what the first defendant had already sold to the plaintiff and what already belonged to the plaintiff; the right to possession and to the timber on the lands. This would also necessarily mean that the second defendant would be likewise guilty of conversion (and trespass to the land) for having entered the lands and extracted timber from the lands for the period ending December 2015, when the rights to do so belonged to the plaintiff"; a conclusion which with respect, is drastic and extremely prejudicial to the warring parties who set about preparing for their case on completely different understandings. In our view, it becomes even more so when the second defendant is found to have trespassed the plaintiff's rights or goods.

[34] The learned JC rationalised that it was not necessary to specifically plead "conversion" (or for that matter trespass) in the statement of claim; that parties are only required to plead facts not law; material facts; that paras. 10, 12 and 13 of the statement of claim contain sufficient facts relating to conversion, concluding and agreeing with the submissions of the plaintiff that he was entitled to the legal results flowing from such pleaded facts:

> ... as regards the first defendant, in granting another power of attorney to the second defendant in August, 2014 the first defendant was in breach of the agreement with the plaintiff that the plaintiff would have the rights to the timber on the Lands until 31 December 2015 and the first defendant would also be guilty of conversion in purporting to re-sell to the [*sic*] first defendant (for an undisclosed sum) what the first defendant had already sold to and what already belonged to the plaintiff (the rights to the timber for the period until December, 2015). As regards the second defendant, the second defendant would be guilty of conversion (and trespass to land) in extracting and selling timber from the Lands for the period until December, 2015 when the rights to do so belonged to the plaintiff.

[35] With respect to the learned JC, although only material facts need to be pleaded upon which parties may then submit and claim the legal consequences of those pleaded material facts; that is still a long way off from concluding that a party may claim any legal consequence, especially one which the pleaded material facts are not capable of yielding or where a particular cause of action has already been charted. It is incumbent on a trial judge to examine all pleaded facts set against the whole pleaded claim. A trial judge should refrain from picking up only certain pleas, and then stringing them to a case different from that which is patently on the face of the pleas

and to which the defendants in this case, have responded through the defences filed, the trial that they prepared for and conducted; and the submissions that they respectively made at the close of evidence.

[36] Had His Lordship considered the whole pleaded claim as appearing in the amended statement of claim, as he was obliged to do so in law, it would be readily seen that the material facts were pleaded to support a claim in contract, relying on the timber sale agreement and the two PAs. From the pleaded claim, it is clear that the plaintiff did not even contemplate a claim in tort, whether in conversion or any other tort. This becomes even more apparent when the submissions are examined, that the claim in conversion was only raised in submissions, and even then, it was in the submissions of the plaintiff that were made in reply to the defendants'. This is evidently erroneous and clearly an afterthought.

[37] It is not open to the court to fashion a cause of action or even defence for any of the parties. The plaintiff had pleaded material facts in his amended statement of claim for his particular choice of cause of action and reliefs (specific performance, injunction and damages). The remedy of specific performance is in fact indicative of what exactly is the plaintiff's cause of action, and it clearly is associated with a claim for a breach of contract as contained in the timber sale agreement and the PAs, all by reason of misrepresentation. The plaintiff was seeking specific performance of the timber sale agreement, and the second PA.

[38] Although the plaintiff may claim to have a cause of action in the tort of conversion, and assuming that he did (to which we disagree as we shall explain shortly), he clearly did not pursue that cause in his pleaded claim. His cause was for breach of contract by reason of misrepresentation, which breaches the first defendant promised to rectify but supposedly did not. Hence, the claim for specific performance.

[39] Even for the tort of conversion, we disagree with the learned JC that there were sufficient material facts pleaded. A claim founded in the tort of conversion must plead the following:

(i) the identity of the goods allegedly converted;

(ii) the assertion of title or possession over those goods;

(iii) the act of conversion;

(iv) the value of the goods or special damage;

(v) the reliefs claimed.

See *Bullen & Leake & Jacob's Precedents of Pleadings* (13th edn) and *Bullen & Leake & Jacob's Malaysian Precedents of Pleadings* (2017).

[40] Further, given the seriousness of the charge of conversion, a specific plea is required. This would also be consistent with O. 18 r. 8 of the Rules of Court 2012 calling for particular pleas. In our regard, the lack of a plea in conversion is fatal in these appeals and on this ground alone, both appeals must be allowed.

[41] In any event, we do not find a claim for conversion made out. In a claim for conversion, it is the goods which are alleged to have been misappropriated and the burden of proof is upon the plaintiff to prove that the defendants have dealt with goods belonging to him, either without his authorisation or consent.

[42] The Court of Appeal decision in *OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd* [2019] 10 CLJ 1; discussed in some details on the law of conversion; see paras. [27] to [44] of the judgment. Conversion is a tort committed by a person who deals with chattels not belonging to him and that dealing is in a manner that is inconsistent with the rights of the owner (para. 27). It is also conversion when one deals with goods belonging to someone else such as to usurp that someone of his proprietary or possessory rights in the goods, however mistakenly or innocent that dealing might have been - see Federal Court in *Rimba Muda Timber Trading v. Lim Kuoh We*e [2006] 3 CLJ 93; [2006] 4 MLJ 505 (para 28). Conversion may also be committed by the wrongful misappropriation of another's chattels, where the other person is deprived of the use and possession of the chattel (para 29); or when there is a lack of mandate or authorisation before the goods of another are taken, detained, sold or dealt with in such manner as to usurp the rights, title, ownership or possession of the other (para 30).

[43] In *OSK Trustees*, it was also recognised that the tort may be committed in different ways:

> [30] The tort may be committed in different ways. In *Director of Forests & Anor*, the Court of Appeal, citing *Winfield & Jolowicz on Tort* (15th Ed), p 588 explained that:
>
> > What kind of right to the goods must the plaintiff have in order that interference with it may amount to conversion? The answer is that he can maintain the action if at any time of the defendant's act he had (1) ownership and possession of the goods; or (2) possession of them; or (3) an immediate right to possess them, but without either ownership or actual possession. This seems to be the law, but it can be elicited only from a great confusion of terminology in the reports. Thus is said in several cases that the plaintiff must have a 'right of property in the thing and a right of possession' and that unless both these rights concur the action will not lie. If 'right of property' means 'ownership', this might lead one to infer that no one can sue for conversion except an owner in possession at the date of the alleged conversion. But that is not so, for a bailee has only possession and not ownership (which

> remains in the bailor) and yet the bailee can sue a third party for conversion. And, as we shall see, one who has mere possession at the date of the conversion can generally sue, and so can one who has no more than a right to possess.

[31] See also *Halsbury's Laws of Malaysia* on how the tort of conversion may be committed:

> *Conversion exists in three forms. The first consists of a positive wrongful act of dealing with the goods in a way which is inconsistent with the rights of the owner, and an intention in so doing to deny the owner's rights or to assert a right inconsistent with them*. This inconsistency with the owner's rights provides the basis of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else; nor need there be any positive intention to challenge the true owner's rights. The action is not one in which fraud is a necessary ingredient, although a conversion may involve a fraud. Goods may be the subject of successive and independent conversions by persons dealing with them in such a manner and with such an intention.
>
> **The second form of conversion relates to the defendant wrongfully detaining the goods of the plaintiff**. The normal method of establishing a wrongful detention is to show that the plaintiff made a demand for the return of the goods and that the defendant refused after a reasonable time to comply with that demand. In many cases this form of conversion will coincide the first.
>
> **The third form of conversion is committed where goods are wrongfully disposed of by the defendant**.
>
> (emphasis added)

[44] Uppermost in the elements of the tort of conversion is the requirement that the plaintiff must have possession or a right to immediate possession of the goods in issue, as expressed by the Court of Appeal in Singapore in *Tat Seng Machine Movers Pte Ltd v. Orix Leasing Singapore Ltd* [2009] SGCA 42; [2009] 4 SLR 1101 and adopted in *OSK Trustees*, that the right to immediate possession must exist at the material time of the alleged act of conversion as the law does not allow the right of possession to be transferred retrospectively. Further, the goods must be specific or clear identifiable - see *Abington v. Lipscombe* (1841) 1 QB 766. Without question, the burden of proof lies with the plaintiff to satisfy all those requirements on a balance of probabilities.

[45] In the present appeals, the identification and existence of the "goods" was seriously in issue. At the hearing of these appeals, both defendants impressed on us the peculiarities of the purported "goods" complained of by the plaintiff, that there could not have been any goods capable of being converted. Compounding the situation was the matter of the second PA, whether it was that which was renewed from 22 March 2013 as claimed by the defendants; or from December 2013 as claimed by the plaintiff.

[46] From the grounds of judgment, it would appear that the learned JC was content to deal with the question of which was the relevant and effective PA; that which was produced by the plaintiff or that which was produced by the first defendant; the answer to which would dispose of the plaintiff's claim; and whether payment under that PA had been settled. In the learned JC's words, the "inevitable consequence of my having ruled that the effective period of the second PA is from December 2013 to December 2015 is that the first defendant would be in breach of contract and also guilty of conversion"; that the first defendant is "guilty of conversion in purporting to sell to the second defendant in August 2014 (for an undisclosed sum) what the first defendant had already sold to the plaintiff and what already belonged to the plaintiff; the right to possession and to the timber on the lands ..."

[47] First and foremost, regardless the copy or set of the second PA, whether it is that claimed by the plaintiff or the first defendant, it was incumbent on the learned JC to determine whether the elements for the tort of conversion had been made out. It was for the plaintiff to prove his case by establishing the identity of the goods alleged to be converted. That critical element is not in the least apparent from the plaintiff's pleaded case which, as it stands, is about the first defendant having misrepresented to the plaintiff that he has rights to the timber on the said lands when he has not. Consequently, the plaintiff was not able to extract timber from the said lands "other than for a few titles from where the first defendant had apparently represented to the Forestry Department that those titles had been purchased by the first defendant". This formed the basis for the issuance of the second PA and it is followed at para. 11 of the amended statement of claim where the plaintiff claimed that despite his assurances, the first defendant "failed to have the titles which were not in his name, registered in his name, as a result of which the plaintiff could not proceed with the timber extraction." One would then understand that it is for this reason that the relief of specific performance is prayed for. If such relief is granted by the court, what would need to be specifically performed must logically be what was contractually promised in the timber sale agreement and/or the PAs, that is, to secure the rights to the timber for the whole of the said lands so that the plaintiff could extract such timber from the said lands. The matter of damages would then be considered under the principles as enunciated in s. 11 of the Specific Relief Act 1950.

[48] Since the plaintiff's case is that the first defendant misrepresented on his rights to the timber on the said lands, it becomes immediately apparent that there cannot be and in effect there are no goods or timber in this case, capable of being converted. If the first defendant himself has no right to the said lands, let alone the timber on the said lands, the rights and the timber cannot "belong" to the plaintiff and there cannot be any proper or valid claim mounted on the tort of conversion. As mentioned earlier, there may be a

breach of contract but that is no longer relevant or available to the plaintiff with his election at the trial. As it stands now, we are hard-pressed to agree with the findings and conclusions of the learned JC.

[49] A perusal of the key documents in this appeal, namely the timber sale agreement and the PA, a necessary exercise which unfortunately was not conducted by the learned JC, confirms this conclusion. These two documents define the underlying relationship of the parties.

[50] The timber sale agreement is about the first defendant selling and the plaintiff purchasing "all the commercial timber extracted" from the said lands. "Commercial timber" or "timber" is understood as "timber which has an economic value and for which there is a ready market. The purchase price for the extracted commercial timber, irrespective of timber species is at the rate of RM700,000. Only 20% of this sum is paid upon signing of the agreement, the rest being paid as follows: 20% upon putting tractor on site, 20% upon issuance of Form I or Form II B timber licence, and 40% on first loading of timber." The said lands were never sold to the plaintiff; only the right to extract commercial timber from the said lands.

[51] However, the extraction of the timber is not by the first defendant but by the plaintiff himself. It is the plaintiff who is responsible for all costs, tax, royalties, payments, etc that are related to such extraction. Pursuant to cl. 4, the plaintiff is also required to extract all merchantable timber within one month from the approval of the timber licence by the Forestry Department, and to complete such extraction within 24 months from the agreement.

[52] In order to facilitate such extraction, the first defendant appoints the plaintiff as his attorney *via* a power of attorney. Under the first PA, a list of 11 specific matters was identified as the ambit or matters which the plaintiff was authorised to undertake under the PA in the first defendant's name; in particular, the plaintiff may:

(i) make and sign application to the Forestry Department, Lands and Surveys Department and other related government departments for the issuance of licence to extract timber, permits, passes and other authority for the purpose of entering upon the said land, extracting and removing timbers therefrom and disposing such timber by sale or otherwise;

(ii) deposit with the Forestry Department, Lands and Surveys Department and other related government departments from time to time such sums of money as shall be necessary in respect of royalty on the timber extracted and removed, security for the payment of such royalties, cess, charges boundary stones and other outgoing;

(iii) extract timber from the said land and employ workmen and obtain such equipment and tools as may be necessary for the purpose and remunerate the workmen in such manner as may be just;

(iv) engage contractors or sub-contractors for the extraction of timber within the said lands upon such terms as my attorney thinks fit ...;

(v) process sale and export (if permitted) such timber as extracted from the said land;

(vi) receive and issue receipts for all monies received in respect of the sale of timber extracted or exported (if permitted).

[53] Of the two documents, clearly it is the timber sale agreement which is more critical as it confers rights or obligations on the parties; as opposed to the PA which is about the list of matters which the plaintiff may undertake, all in the first defendant's name or on his behalf. In other words, *sans* the agreement, the PA really was of not much utility.

[54] The plaintiff has not alleged that the timber sale agreement was renewed or extended at the same as the second PA, whether expressly or by inference. The defence does not make such plea either but at the trial and certainly before us, this is a material issue, and it is an issue which the first defendant is entitled to raise. In our considered view, if the timber sale agreement was not renewed, then whatever may have been authorised under the PA, whether the first or the second PA, remain very much matters done on behalf of the first defendant. With respect to the learned JC, this material and relevant issue was not at all considered.

[55] The terms of the timber sale agreement bring to bear that all the plaintiff had bought from the first defendant was a licence or a contractual right to extract commercial timber from the said lands. The agreement was never about the sale of the said lands and this distinction is valid and relevant to the cause of action - see *Morgan v. Russell & Sons* [1909] 1 KB 357. Such contractual right, an actionable claim is not capable of being converted in law. The plaintiff's remedy, if at all there is a breach, lies in contract but not in the law of torts. We are thus in agreement with learned counsel for the first defendant that the learned JC had erred in equating a contractual claim with a tortious proprietary claim for conversion. If at all, the plaintiff may only sue for breach of contract but he cannot by virtue of the timber sale agreement or even the PAs, assert rights or ownership over the said lands, or even the trees or timber on such lands.

[56] Further and in any case, we agree with the submissions of the first defendant that until the timber is extracted through a licence issued by the Forestry Department under the Sabah Forest Enactment 1968 (see s. 23) for the legal felling or cutting of the trees of whatever timber species that are found on the said lands, there are no goods or chattels capable of being converted by the defendants. Unlike the facts in *Kemajuan Kuari (M) Sdn Bhd v. PTB Suramix Sdn Bhd & Ors* [2016] 4 CLJ 200, a decision which was erroneously relied on by the learned JC in this appeal, where the rocks had already been extracted and stockpiled, the timber on the said lands have yet

to be extracted. Until that process of felling of the trees is properly and legally undertaken, the trees remained very much trees and formed part of the said lands which were never sold to the plaintiff in the first place. The trees and thereby the timber never belonged to the plaintiff and this becomes even more obvious when one appreciates the fact that the right to extract the timber was only for a limited period of 24 months.

[57] Consequently, there was no timber or goods to convert. As pronounced in *OSK Trustees* (*supra*), following *Abington v. Lipscombe* (*supra*), the goods must be specific or clearly identifiable. Since the plaintiff alleges that the first defendant had misrepresented that he was the owner of all 467 native titles when he was not, we cannot see how a claim in conversion is at all sustainable. The learned JC has thus fallen into error in allowing the plaintiff's claim in conversion and the appeal must therefore be allowed.

[58] We are not prepared to consider a claim in contract for the simple reason that the plaintiff has elected to pursue a claim in the tort of conversion. It is now too late for the plaintiff to reverse and rely on a contractual claim.

[59] In any case, we do not find such a claim made out by the plaintiff. The learned JC had chosen to believe the plaintiff on the relevant second PA, that it was for a two-year period from 31 December 2013 and not from 22 March 2013 when the first PA expired. The reasons for His Lordship's conclusion have already been set out earlier; that if the first defendant's version was true, it was inconceivable for the first defendant to not tell that to the Forestry Department at the material time.

[60] The first defendant had offered his explanations on the existence of the three sets of the second PA but these explanations do not appear to have been considered by the learned JC. The first defendant had explained that he was approached by the plaintiff in early 2013 for an extension of the first PA and this was before the expiry of the first PA. The plaintiff needed the extension supposedly due to the difficulties faced in obtaining the necessary licence to extract timber from the Forestry Department. However, those difficulties were never brought to the first defendant's attention; neither did the plaintiff ever complained to the first defendant that he was unable to get licences for the extraction of timber on those lands where the first defendant was not the registered owner. The first defendant further claimed that the plaintiff only started extracting timber in the second year of the timber sale agreement and the first PA as evidenced by the plaintiff's application for boundary surveys for the said lands (24 July 2012) and licence to remove extracted logs (19 September 2012), and that the plaintiff did not apply for any licence after December 2012 "because it was rainy season" (see notes of proceedings at p. 39). Be that as it may, after negotiations, the extension was agreed and the second PA prepared.

[61] In our view, since the second PA was to extend the period of extraction of timber, the defendants' version is inherently more probable - that the second PA would run from the expiry of the first PA instead of this substantial lapse of almost nine months in the case of the second PA relied on by the plaintiff, more so when it is appreciated that the PA was always to facilitate the timber sale agreement. The plaintiff offered no explanation on this. Instead, the existence of the three sets of the second PA is consistent with the first defendant's version on the second PA that initially he was only prepared to give the plaintiff a PA for 12 months but after negotiations, he was agreeable to a 24-month period from the expiry of the first PA.

[62] Further, the plaintiff never denied that it was he who dated the second PA, though signed by the first defendant, thus lending credence to the first defendant's version on the second PA which ought to have been picked up by the learned JC. In any case, the second PA did not give exclusive authorisation to the plaintiff; that it was open to the first defendant to give the second defendant a power of attorney.

[63] Before leaving this issue of the second PA, we must add that it was also not open to the learned JC to find the two defendants jointly and severally liable. There is no plea to that effect and the rules on pleading as adumbrated earlier, apply with equal force to this ground of appeal relied on by the defendants. The finding of liability against the defendants is therefore erroneous and is liable to be set aside; and we do so accordingly.

[64] Finally, the matter of damages awarded to the plaintiff. The defendants are not pursuing the appeal against the dismissal of their counterclaim. In this regard, we too, find error in the principle of award and its quantification.

[65] On a matter of principle, it must always be borne in mind that it is for the plaintiff to prove. The law is trite in this regard - see *Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd* [2017] 5 CLJ 150; [2017] 1 MLJ 418 which also discussed the related case authorities. The court was obliged to bear in mind that the primary relief for a breach of contract was for the discretionary order of specific performance. An award for damages is made either on the basis that the first order needs to be supplemented or *in lieu* of such an order, grant an award of damages. With the plaintiff's election, this no longer applies. As for the tort of conversion, damages would be compensatory, the burden would be on the plaintiff to prove what his profits were.

[66] According to the learned JC, after rejecting the plaintiff's estimates for his loss of profits, the sum of RM2,680,511.68 that was awarded to the plaintiff as damages was calculated on the second defendant's pleaded case. We have carefully perused the cause papers, and the submissions at the High Court and we are unable to find such record. The first defendant's pleaded counterclaim was for the payment for the balance sum of RM150,000,

declaratory orders and all consequential losses and damages due to the plaintiff's interference in the second defendant's extraction of timber. The second defendant's counterclaim was for operational costs and loss of sale of extracted logs totaling RM2,015,264.

[67] We are of the considered view that since the learned JC had rejected the estimates relied on by the plaintiff, and given that there are no pleas by the second defendant for loss of profits, there was really at the end of the day, no evidence before the High Court to make the award that it did. The plaintiff had failed to prove his claim and his loss.

[68] Accordingly, the defendants' appeals are of merit and are hereby allowed with costs, and the decision of the High Court is set aside.